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No. 551

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners*,

v.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ....

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners,*

v.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of South Dakota, entered on July 21, 1958, affirming the judgment, insofar as it awards damages, of the Circuit Court of Minnehaha County, Second Judicial Circuit, South Dakota, entered on March 17, 1956.

CITATIONS AND OPINIONS BELOW

The opinion of the Supreme Court of the State of South Dakota, dated July 21, 1958, is unreported and is printed in Appendix "A", *infra,* pp 1a-20a. No opinion was written by the Circuit Court of Minnehaha County, Second Judicial

Circuit, South Dakota; the Judgment, Findings of Fact and Conclusions of Law of that court are printed in Appendix "B", *infra*, pp 21a-31a.

JURISDICTION

The judgment of the Circuit Court of Minnehaha County, Second Judicial Circuit, South Dakota was entered on March 17, 1956. The judgment of the Supreme Court of the State of South Dakota was entered on July 21, 1958. Petition for re-hearing was denied by the Supreme Court of the State of South Dakota on September 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTE INVOLVED

The statutory provisions involved are included in the Labor-Management Relations Act, 1947 (61 Stat. 136; 29 U.S.C. (Supp. 1), Sec. 141 et seq. Taft-Hartley Act). See, *infra*. pp. 49a-52a.

QUESTIONS PRESENTED

The conclusions of the Supreme Court of the State of South Dakota in its opinion in this case raise the following questions:

1. Whether a state court may assert jurisdiction to award damages to an employer based upon violation by a Union of a state statute relating solely to labor-management relations where no proceedings were ever initiated by the employer before the National Labor Relations Board even though the employer's business affected interstate commerce and the asserted acts by the Union allegedly violative of the state labor-management relations law might constitute unfair labor practices under Sections 8(b)(2) and 8(b)(4) of the Labor-Management Relations Act, 1947?

2. Whether a state court may assert jurisdiction to award damages for alleged tortious conduct arising out of

a violation of a state labor-management relations statute where the state court may not assert jurisdiction to award injunctive relief from the said conduct because of the exclusive jurisdiction of the National Labor Relations Board under federal law?

In connection herewith, there are presented the subsidiary questions of whether a state court may assert jurisdiction to award damages where (a) the only conduct involved is peaceful, or (b) where the award is not predicated upon a common law action but, rather, based upon a state statute relating solely to labor-management relations, or (c) where the damages sought are incidental and ancillary to the injunctive relief requested?

3. Whether a state court has jurisdiction to award damages for union conduct violative of a state labor-management relations statute where compensation for damages arising out of such union conduct may be secured by an action at law which may be brought under the federal labor-management relations statute.

4. Whether a state court may assert jurisdiction to hold an International Union liable in damages for the tortious conduct of an alleged "agent" in view of the definitional provision in the federal labor-management relations statute relating to "agent" and the possibility of conflict between state court decisions applying state law and the National Labor Relations Board determinations or federal court decisions, particularly where redress for such conduct may be secured under the federal labor-management relations statute.

5. Whether a state court may assert jurisdiction to award punitive damages for conduct violative of a state labor-management relations statute where the federal labor-management relations statute providing a remedy for compensating persons injured by such conduct makes no provisions for punitive damages but, instead, limits recovery to "the damages . . . sustained and the cost of the suit"?

STATEMENT OF THE CASE

I. When and How the Federal Questions Were Raised.

The federal questions presented by this petition were timely raised and preserved. The opinion of the Supreme Court of the State of South Dakota reflects a consideration of these questions.

Specifically, the federal questions were raised by petitioners, other than the International Brotherhood of Electrical Workers, in their amended answer to supplemental complaint and by the second amended separate answer of the International Brotherhood of Electrical Workers (Appendix "C", *infra*, pp. 32a-35a); by the defendants' proposed findings of fact and conclusions of law refused by the Circuit Court of Minnehaha County (Appendix "D", *infra*, pp 36a-42a); and by the assignment of errors in the Circuit Court of Minnehaha County (Appendix "E"; *infra*, pp. 43a-48a).

II. The Facts.

The plaintiff is a corporation engaged in the electrical construction contracting business at Sioux Falls, South Dakota, and its interstate activities are of such a nature that the Court below assumed that "plaintiff does not seriously question that the facts would warrant a decision by the National Labor Relations Board that the businesses involved affect interstate commerce."

The defendants are Jim DeVries, business manager and financial secretary of Local No. 426, of the International Brotherhood of Electrical Workers, O. E. Root, President of Local No. 426, and the International Brotherhood of Electrical Workers which is a labor union having affiliated with it approximately 1800 local unions with a membership of approximately 600,000 located in the United States, Canada, Canal Zone and Hawaii.[1]

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[1] The defendants Sodak Picket and Sinclair Picket were never served with process in the action.

In May, 1955, defendant DeVries in his capacity as business manager for Local No. 426 had a discussion with the president of the plaintiff corporation concerning the latter's willingness to agree to the same terms and conditions of employment which had been tentatively agreed upon by the union and other electrical contractors in Sioux Falls. Plaintiff took the position that it was up to the men in his employ as to whether they wanted to belong to a union and as soon as there was a majority of union members in his employ, the proposed contract would be signed. Two subsequent similar conferences were held but plaintiff continued to refuse to sign an agreement.

In July 1955, the Executive Board of the local union decided that plaintiff's job should be picketed and on or about July 25, 1955, the local union commenced peaceful picketing at two jobs where plaintiff was performing work under subcontracts; other jobs being performed by plaintiff were subsequently picketed. The pickets carried a sign upon which appeared the following words: "Electrical work on this job was not done by members of Local 426, IBEW". Upon the appearance of pickets, union men of the other crafts refrained from proceeding with their work with the consequence that plaintiff's work on a number of projects was terminated and plaintiff received payment for the work done on these jobs on a time and material basis.

Shortly after the picketing commenced plaintiff instituted this action in which it originally prayed only for a permanent injunction. The trial court issued a temporary restraining order and picketing ceased. Upon dissolution of the restraining order, however, picketing resumed and plaintiff thereafter amended its complaint to pray for damages, as well as a permanent injunction, in the amounts of $3,177.84 for actual damages and $25,000 exemplary damages.

The complaint alleged that the defendants caused the picketing to be undertaken in order to coerce and compel plaintiff to violate the South Dakota right to work law. The defendants DeVries, Local No. 426 and O. E. Root denied the controversial allegations in the complaint and,

in addition, challenged the jurisdiction of the trial court on the ground that state courts lack jurisdiction in this matter since plaintiff's grievance falls within the purview of the Labor-Management Relations Act, 1947. The defendant International Brotherhood of Electrical Workers answered separately, advancing the same defenses interposed by the other defendants and also denied that it had any part in the activities about which plaintiff complained.[2]

On February 6, 1956, the trial court ordered that the issues presented by the plaintiff's second cause of action wherein it sought actual and exemplary damages be tried to a jury, and further, that all the evidence received on the trial of such issues be deemed received by the court for the purposes of the trial of the issues contained in plaintiff's first cause of action seeking a permanent injunction. On March 17, 1956, judgment was entered in favor of plaintiff and against the defendants DeVries, Local Union No. 426 and the International Brotherhood of Electrical Workers for the sum of $3,177.84 actual damages and $20,000 exemplary damages and the judgment further provided that the defendants DeVries, O. E. Root, Local Union No. 426 and the International Brotherhood of Electrical Workers be permanently enjoined from picketing the plaintiff.

Defendants appealed from the decision of the trial court on the ground, inter alia, that it lacked jurisdiction to grant such relief for alleged unfair labor practices under the Labor-Management Relations Act, 1947. In the opinion rendered on July 21, 1958, the Supreme Court of the

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[2] Mr. Robert Garrity, the international representative of the International Brotherhood of Electrical Workers, whose testimony was uncontroverted, testified that his first knowledge of the differences between plaintiff and defendants occurred when he was advised of the commencement of the action against defendants, that at no time did he, as the international representative, authorize or direct the picketing of plaintiffs' jobs or participate in any organizational efforts directed against plaintiff and that he could not direct the local union to picket or not to picket. (Tr. 193-196)

State of South Dakota affirmed the trial court "in so far as the judgment awards damages . . .; otherwise, it is reversed."

III. The Disposition Below of the Federal Questions.

In its decision, the Supreme Court of South Dakota stated that "it is obvious the record would warrant a ruling by the National Labor Relations Board that defendants' conduct was proscribed as an unfair labor practice by §158(b)(2 & 4)" of the Taft-Hartley Act since defendants "sought through peaceful picketing to bring economic pressure to bear on plaintiff and cause it, by discrimination in regard to tenure of employment, to encourage its employees to join the local, and also to enhance that pressure on plaintiff, by inducing the employees of the general contractors, under whom plaintiff was working, to engage in a concerted refusal in the course of their employment to perform any services for the purpose and with the object of forcing those general contractors to cease doing business with plaintiff." Accordingly, the Supreme Court of the State of South Dakota concluded, on the basis of this Court's decision in *Garner* v. *Teamsters Union*, 346 U.S. 486, that "the exclusive primary jurisdiction to pass on this evidence and determine whether defendants' conduct constitutes an unfair labor practice and to decide whether remedial procedures should be initiated, rests in the National Labor Relations Board and hence the trial court was without jurisdiction to enjoin that conduct."

With respect to defendants' contention that because of federal pre-emption of the field of labor relations as to industries that affect interstate commerce the trial court lacked jurisdiction to impose sanctions by way of damages for injuries resulting from defendants' conduct, the court below stated:

> "It is our understanding that the Supreme Court has expressed a contrary view in United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656, 74 S. Ct. 833, 91 L. Ed. 1025, and in Interna-

tional Union, United Automobile, Aircraft and Agricultural Implement Workers of America et al. v. Paul S. Russell, 356 U.S. 634, 78 S. Ct. 932, ... L. Ed. ..... And see San Diego Building Trades Council v. Garmon, 353 U.S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618, and Garmon v. San Diego Trades Council, ... Cal. ....., 320 P. 2d 473. Therefore, we hold the contention to be inadmissible."

Reasons For Granting The Writ

1. In upholding the award of damages, the Court below erroneously relied upon this Court's decisions in the *Laburnum, Russell* and *Garmon* cases, *supra,* and also upon the decision of the California Supreme Court in the Garmon case after remand by this Court for further proceedings. Not only do the decisions of this Court upon which the Court below relied not support its conclusions in the instant case but the California Supreme Court decision upon which the Court below also placed reliance is itself now under review by this Court and currently appears as *San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36, Petitioners* v. *J. S. Garmon, J. M. Garmon and W. A. Garmon, Respondents,* No. 66 of the October Term, 1958.

To a substantial degree the issues presented by the Garmon case now awaiting argument before this Court are similar to the issues presented in the instant case. Indeed, it would appear that disposition of the issues presented in Garmon favorably to the petitioners therein would, *a fortiori,* be dispositive of the issues favorably to the petitioners in the instant case. Under the circumstances, we respectfully submit, issuance of a Writ of Certiorari to the South Dakota Supreme Court would clearly appear to be warranted.

In the pending *Garmon* case, this Court has been requested to decide the following questions:

1. May a state court award damages where the National

Labor Relations Board has exclusive jurisdiction but has declined to act?

2. If the answer to question 1 is in the affirmative, may a state court assert jurisdiction to award damages where it may not award injunctive relief?

3. If the answers to questions 1 and 2 are in the affirmative, may a state court assert jurisdiction to award damages where such are incidental to and ancillary to the injunctive relief sought?

4. If the answers to questions 1, 2 and 3 are in the affirmative, may a state court assert jurisdiction to award damages based upon state statutes relating solely to labor-management relations?

5. If the answers to questions 1, 2, 3 and 4 are in the affirmative, may a state court assert jurisdiction to award damages where the only conduct involved is peaceful?

The similarity of the foregoing questions, as presented in the pending *Garmon* case, with those presented in the instant case, supra, at pp. 2-3, is readily apparent. And, as suggested above, reversal by this Court of the California Supreme Court in the *Garmon* case would appear to require, *a fortiori,* a reversal in the instant case. Affirmance, however, of the California Supreme Court in *Garmon* may not decide all of the questions posed herein or dispose of this case in view of the several aspects wherein this case differs from *Garmon,* namely, the absence of any attempt on the part of the employer here to resort to the National Labor Relations Board, the presence of a specific remedy by way of a suit for damages under Section 303(b) of the federal law for the particular conduct regarded as tortious under state law and the sharp conflict between federal and state laws with respect to the responsibility of an International Union for the tortious conduct of local union members as well as the extent of such liability. In any event, the fact that *Garmon* is pending is a compelling reason for issuing a writ of certiorari herein.

2. The court below erroneously ruled that the trial court had jurisdiction to award damages in the instant case under the Constitution, statutes and decisions of the state, even though the Congress had by Section 303 of the Act provided a comprehensive remedy in damages for the conduct which is the subject of this case. The Supreme Court of South Dakota relied upon the language in the *Laburnum* case negating the application of the preemption doctrine in a case involving a violation of Section 8 (b) (1) A of the Act where "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." (347 U.S. at 663-4.) In doing so, the court below omitted to recognize that the instant case, which it conceded involved a violation of Section 8 (b) (4) A of the Act, also constituted a violation of Section 303 (b) of the Act. That section was described by this Court in the *Laburnum* case in the following language:

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of Federal and other courts to adjudicate claims for damages resulting from secondary boycotts . . . *By this provision, the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts* . . ." (italics supplied) (347 U.S. at 665-666).

In *Laburnum* and *Russell,* this Court held that a state court may hear and determine the issues in a common law tort action for damages based upon tortious conduct which also constituted an unfair labor practice under the federal labor relations law. In both of these cases, the injured persons had brought *common law* tort actions, not damage suits based upon a violation of state labor relations statutes. In both of these cases, the tortious conduct upon which the actions were predicated were of such a nature, involving violence and threats, that it could have been enjoined by the state courts of Virginia *(Laburnum)* and Alabama *(Russell).* And, in both cases, this Court appears

to have been primarily concerned with the absence of a "substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct", *United Workers* v. *Laburnum*, 347 U.S. at 663. As this Court stated in its *Laburnum* decision:

> "In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result." (347 U.S. at 663.)

The same view was subsequently expressed by this Court in its decision in the *Russell* case. After noting that "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct" (356 U.S. at 643), this Court pointed out that in its *Laburnum* decision, in distinguishing its decision in *Garner*, it had said:

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." (78 S. Ct. at 938.)

Accordingly, recognizing that "if the employee's common law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or co-

ercion such as was employed during the strike in the present case" (78 S. Ct. at 939), this Court in *Russell* concluded that "an employee's right to recover, in the state courts, all damages . . . caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." *(ibid.)*

The declaration of congressional policy applicable to the kind of tortious conduct involved in the instant case is clear but it was completely ignored by the court below. Here, the Union's conduct was peaceful, not violent or threatening. Here, the injured party did not seek redress in a common law tort action but has sought, rather, to recover damages for violation of a state labor relations statute. And, most significantly, here "Congress has . . . prescribed procedure for dealing with the consequences of tortious conduct already committed. . . ."In affording the remedy prescribed in Section 303 (b) of the Taft-Hartley Act, Congress has established a general scheme authorizing federal and state courts to award full compensatory damages for injuries caused by the explicit wrongful conduct of which the petitioners here have been charged. Under the circumstances, redress could not properly be sought under conflicting state laws,[3] and the court below was thus in error in upholding the trial court's assertion of jurisdiction.

Petitioners respectfully submit that the court below erroneously relied on this Court's decisions in *Laburnum* and *Russell,* that the decision below is inconsistent with those decisions which would, in fact, support a conclusion directly contrary to that reached by the Supreme Court of South Dakota.

3. A determination of the questions presented in the instant case is vitally important to the administration of

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[3] The opinion of the court below makes it clear that "Request for application of Section 303, 61 Stat. 158, 159, 29 U.S.C.A. Section 187 (b) was not presented to the trial court in any manner." (App. *infra* pp. 11a-12a)

Federal labor relations law, because the increase in the number of damage suits filed against unions and the sums involved, which are substantial in relation to the size of the union treasuries, make it essential to effect further clarification of the appropriate areas of Federal and state law.

In recent years this Court "has had numerous occasions to deal with this delicate problem of the interplay between state and federal jurisdiction touching labor problems" (*Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 474). And on such occasions this Court has explicitly refrained from enunciating rigid pervasive principles relating to the problem of federal preemption, preferring to handle it on a case by case basis, since "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation" *International Association of Machinists* v. *Gonzales*, 356 U.S. 617,

Further judicial elucidation is now essential for the administration of the federal act because the questions posed herein have not heretofore been decided by this Court. For example, in the picketing cases wherein this Court has upheld a state court's award of damages, the union conduct has been of such a nature as would have warranted the granting of injunctive relief by the state court. Also, in such cases, no federal remedy for the wrongful conduct, such as is provided in Section 303(b) of the federal act relating to secondary boycott conduct which is here involved, was readily available. Nor has this Court had the opportunity to determine whether a state court has jurisdiction to hold an International Union responsible, solely by virtue of the constitution of the International and by-laws of the local, for the unauthorized or unratified acts of members of the local union in which the International did not participate where such a state court ruling conflicts with decisions of the National Labor Relations Board under Section 2(13) of the federal act which relates to "determining whether any person is acting as an 'agent'

of another person so as to make such other person responsible for his acts." Nor has this Court passed on the scope and application of the limitation contained in Section 303(b) of the federal act on the damages recoverable for injuries resulting from activities constituting a secondary boycott.

The court below decided these questions in a manner contrary to the clear implications appearing in past decisions of this Court and if the decision is permitted to stand state courts could defeat the carefully protected uniformity which is the very reason for the doctrine of preemption.

In the *Weber* case, it was noted that in the *Laburnum* case "this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted" (347 U.S. at 477). Similarly, in *International Association of Machinists* v. *Gonzales*, *supra*, the state remedy for breach of contract was not displaced because the potential conflict with federal policy was "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act" (346 U.S. at 621).

These decisions emphasize the concepts of "uniformity," "conflict" and "unavailability of a conflicting federal remedy." Since, in the instant case, the assertion of state jurisdiction is made in the face of an available federal redemy which conflicts with the state remedy, the state remedy ought to be displaced, particularly when not to displace it clearly makes it impossible "to obtain uniform application of . . . substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." (346 U.S. at 490).

The most readily apparent "diversities and conflicts" which result from the decision of the court below relate to the court's rulings which award punitive damages and hold

the International Union liable in damages, as a principal, for the unauthorized and unratified acts of local union members in which the International Union did not participate. In the view of the court below "the constitution of the International and by-laws of the local make the manager of the local the agent of the International in organizing the territory within the jurisdiction of the local, and . . . the conduct of which plaintiff complains is that of the manager and was indulged in the course and scope of his agency."

Contrast this holding with the recently expressed conflicting view of the National Labor Relations Board in a case involving the same International Union which is the petitioner herein. In *International Brotherhood of Electrical Workers, AFL-CIO, and International Brotherhood of Electrical Workers, Local 5, AFL-CIO and Sherman T. Rock, an individual,* 121 NLRB No. 26 (July 24, 1958), the Board held that the International Union was not responsible for violations of Section 8(b)(4)(A) of the Act committed by its local union. The Board therein stated that "the overwhelming weight of judical authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter" and "that too has been the position of the Board," citing, *inter alia,* the cases listed in the footnote below.[4] The Board further stated:

> . . . If the local in this case is merely an administra-

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[4] *Coronado Co.* v. *United Mine Workers,* 268 U.S. 295, 299; *United Mine Workers* v. *Coronado Co.,* 259 U.S. 344, 393; *United Construction Workers* v. *Haislip Baking Company,* 223 F. 2d 872 (C.A.4), cert. den. 350 U.S. 847; *Di Georgio Fruit Corp.* v. *N.L.R.B.,* 191 F. 2d 642 (C.A.D.C.); *Pennsylvania Mining Co.* v. *United Mine Workers,* 28 F. 2d 851 (C.A. 8), cert. den. 279 U.S. 841; *International Longshoremen's and Warehousemen's Union (Sunset Line & Twine Company),* 79 NLRB 1487; *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company),* 87 NLRB 54; *General Electric Company,* 94 NLRB 1260.

tive arm of the IBEW International, the Board has been in error all these years in requiring that locals of the IBEW as well as of other international unions comply with the filing requirements of Section 9(f), (g), and (h) of the Act. And if locals are only "administrative arms," and not separate entities, they are probably incapable of withdrawing from their internationals, as for example, when the internationals are ousted from the AFL-CIO.

"An international union's constitution regulates and controls the operations of its constituent locals. But that regulation is rarely so complete as to make the local merely a branch of the international . . . Probably no international union regulates the affairs of its locals more closely than does the United Mine Workers yet, beginning with the Coronado cases, the Federal Courts have consistently refused to find that locals of the Mine Workers are mere branches of the International so as to make the latter automatically responsible for the legal wrongs committed by the locals." [8]

Accordingly, as matters now stand, the International Brotherhood of Electrical Workers is financially responsible in the State of South Dakota for the tortious conduct of local union members on a theory of agency which the National Labor Relations Board, in effectuation of the national policy, has specifically rejected. Had the action been brought under Section 303(b), as it should have been, "uniformity of substantive law so essential to matters having an impact on national labor regulation" would have been assured (356 U.S. at 631).

In addition to this conflict between state law and federal policy, there is the further sharp inconsistency resulting from the state court's imposition of liability for punitive damages and the liability imposed by section 303(b) of the federal act, for just the kind of conduct here involved, for

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[8] *International Brotherhood of Electrical Workers (AFL-CIO) and Local 5 and Sherman T. Rock, supra*, p. 15.

"damages . . . sustained and the cost of the suit." "That section makes no provision for the recovery of punitive damages" and "there is nothing in the language of [that section] . . . or in the history, that indicates that Congress intended that anything more than actual damages be recovered." *United Mine Workers of America* v. *Patton*, 211 F. 2d 742, 749.

That the imposition of punitive damages in the state court was in response to those "local procedures and attitudes toward labor controversies" from which the *Garner* case sought to isolate national labor regulation is particularly evident from the remark in the decision below that "If such a giant [IBEW], and other like giants were to be deterred from employing traditionally coercive organizational methods in South Dakota, the jury could reasonably conclude it needed to fix an exemplary award which would cause such activities to appear to be unprofitable."

In short, according to the court below, the power to deter is to be found in the power to award punitive damages even though the court fully appreciates that its jurisdiction to award injunctive relief has been preempted. The fact is, however, that the Congress intended to effect deterrence only by the provision of compensatory damages. Senator Taft described the purpose of section 303 as follows:

> ". . . I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost. I do not think suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent to prevent unions undertaking this kind of racketeering (sic) activity." (L. M. R. A. Legislative History, p. 1371)

CONCLUSION

For reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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December, 1958.

APPENDIX

APPENDIX

APPENDIX A

No. 9629

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SMITH, Judge.

The plaintiff recovered judgment below against the defendants Jim DeVries, Electrical Workers Local No. 426 of the International Brotherhood of Electrical Workers, and the International Brotherhood of Electrical Workers for $3,177.84 actual damages and $20,000 exemplary damages, and permanently enjoining them and one O. E. Root from picketing plaintiff, Baumgartner's Electric Construction Co. "for the purpose of inducing or persuading the Plaintiff to curtail or interfere with the free exercise of the right to work of Plaintiff's employees, or to compel or coerce Plaintiff's employees to join the union or to persuade the Plaintiff to terminate the employment of any of Plaintiff's employees on account of membership or nonmembership in any Labor Union." We shall separately state and consider the questions presented by the appealing defendants. First, we develop a background of evidence. In so doing we shall refer to the plaintiff as "Baumgartners", to the defendant DeVries as the "manager", the defendant Local No. 426 as the "local" and the defendant International Brotherhood of Electrical Workers as the "International".

The International is an association of individual electrical workers and local unions. Its more than 600,000 members are organized into more than 18,000 chartered local unions. The constitution of International is binding on its members and is included in the by-laws of the locals.

The plaintiff, Baumgartner's Electric Construction Company, is a family corporation engaged in electrical construction contracting at Sioux Falls, South Dakota, within the territory assigned to the local. At the times in question it employed seven men, none of whom was a member of the local.

The plaintiff's purchases of material from out of the state for the year before trial amounted to $13,879.33. Its executive officer expressed the opinion that all of the $69,220.73 worth of material used by it during that year was manufactured outside of South Dakota. The purchases of general contractors, under whom plaintiff held subcontracts, during the period amounted to $1,243,835 of which $182,788 was from out of the state.

In the spring of 1955 the manager was engaged in negotiations with the Sioux Falls electrical contractors as to the terms and conditions of a contract the local was to make with each contractor. By May 1st tentative terms of that contract had been agreed upon between the manager and several of the contractors. About that time the manager called on Tom Baumgartner. According to the manager he asked that Baumgartners go along with the same contract and conditions to which other contractors had tentatively agreed. He did not at that time ask Baumgartner's employees to join the union. He admitted that he was then engaged in "organizing" and that he tried to explain to Baumgartner the merits of running a shop which would "employ our people." According to Tom Baumgartner the manager said "they might take two of Baumgartner's men on permit, but one way they could prove they were good union men was by going to work for someone else; they couldn't work for Baumgartners. The rest, he said, would have to be replaced with union men."

Baumgartner told him he had no objection to signing a union contract but it was up to his men; until they belonged to the union he would not sign. Two subsequent similar conferences were had in which Baumgartner refused to sign. On or about July 25th, following action by the local, the manager started picketing at certain of the projects in Sioux Falls where Baumgartners were doing work under subcontracts. The picket in each instance carried a sign reading "Electrical work on this job was not done by members of Local 426, IBEW." The manager said this was done to inform other workmen and contractors in Sioux Falls that Baumgartners were not complying and that he had spoken to the agents of the other crafts. He said we may have requested the support of the other crafts. Workmen of other crafts had worked with Baumgartner's men but as soon as the pickets appeared the union men left their work and the project shut down. As a result, the general contractor, and, in one instance, an owner, instructed Baumgartners to discontinue its work and replaced it with a contractor who employed union men. Other crafts returned to the project as soon as the substitution was effected. By this process Baumgartners were successively taken off from eight projects it had under contract between July 25th and November 1st.

Among the picketed projects above mentioned were certain Sinclair stations on which Swift Bros. Construction Company was the general contractor. Mr. Swift was called as a witness for Baumgartners. They had contracts with Baumgartners on four stations. When the picketing started, Mr. Swift arranged a meeting at the Labor Temple with managers of the craft unions including Mr. DeVries. He proposed to them that they allow Baumgartners to complete two stations on which it had done considerable work, and he would arrange for a replacement on the other stations. His proposal was rejected. He testified that Mr. DeVries, the manager, stated at that meeting he could not give his blessing to working with non-union craftsmen and he refused to call off his pickets.

Another project which was picketed was designated as the Reardon Building. According to the testimony of the manager, he telephoned Mr. Reardon prior to the picketing "and told him Mr. Baumgartner was not complying with our agreement we had with other contractors in regard to wages and ratio of journeymen and apprentices, and I asked him if he would get a contractor who would comply; if not, we would possibly have to put a picket on his place."

Shortly after the picketing started plaintiff instituted this action. Its original complaint prayed only for a permanent injunction. The trial court issued a temporary restraining order. Thereupon the picketing ceased. After hearing upon an application of the defendants, the temporary restraining order was dissolved on August 15th. Thereupon picketing was resumed. Thereafter plaintiff amended its complaint and prayed for damages as well as a permanent injunction.

The first contention to be considered is whether the trial court was without jurisdiction to issue the injunction because the Congress has vested exclusive jurisdiction in the National Labor Relations Board to deal with the conduct it has enjoined.

By Article VI, Section 2 of the constitution of South Dakota it is provided "***The *right of persons to work* shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization." *Plaintiff's action is grounded upon this provision and the statutes (SDC Supp. 17.11) enacted in furtherance of the policy therein declared.*

From the Labor Management Relations Act of 1947 (the Taft-Hartley Act 29 U.S.C.A. 141 et seq. we quote provisions as follows:

> No. 157. "Employees shall have the right to * * * join * * * labor organizations, * * * and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

No. 158. "(a) It shall be an unfair labor practice for an employer—

"(1) to * * * coerce employees in the exercise of the rights guaranteed in section 157 of this title;" * * *

"(3) by discrimination in regard to * * * tenure of employment * * * to encourage * * * membership in any labor organization:

Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (* * *) to require as a condition of employment membership therein * * * if such labor organization is the representative of the employees as provided in section 159 (a) of this title, * * *.

(b) It shall be an unfair labor practice for a labor organization or its agents— * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in * * * a concerted refusal in the course of their employment * * * to perform any services, where an object thereof is: (A) forcing or requiring any employer * * * to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;"

No. 160. (a) "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be

affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; * * *"

The contention of defendants that plaintiff's grievance falls within the jurisdiction of the National Labor Relations Board and hence that the state court is without jurisdiction to enjoin the exhibited conduct is grounded on the supremacy clause of the Constitution of the United States and these provisions of the Taft-Hartley Act.

We approach consideration of this contention under the assumption plaintiff does not seriously question that the facts would warrant a decision by the National Labor Relations Board that the businesses involved affect interstate commerce. Cf. National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284. And see Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601; Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20, 77 S. Ct. 604, 1 L. Ed. 2d 613; and San Diego Building Trades Council v. Garmon, 353 U.S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618.

In Garner v. Teamsters C. & H. Union, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, the court was considering peaceful picketing which a trial court had held to be for the purpose of coercing an employer into influencing its employees to join a union contrary to the Pennsylvania Labor Relations Act. In its opinion, written by the late Mr. Justice Jackson, these paragraphs appear.

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the

Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts may adjudge the same controversy and extend its own form of relief.

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 82 L. ed. 638, 58 S. Ct. 459; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 84 L. ed. 738, 60 S. Ct. 561."

The holding was that the grievance there considered was not subject to litigation in the tribunals of the state.

In Weber v. Anheuser-Busch, Inc., 348 U.S. 468 at 475, 75 S. Ct. 480, 99 L. Ed. 546, the court reviewed the course of its decisions under the Wagner and Taft-Hartley Acts. In treating of the Garner case, supra, it said, "A State may

not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the Garner case, supra." And it further said at page 479, "In Garner the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

In International B. of E. W. v. Nat. L. R. Bd., 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 1299, in a case dealing with interstate commerce, it was held that a labor organization and its agent committed an unfair labor practice within the meaning of § 158 (b) (4), supra, when by peaceful picketing, the agent induced employees of a subcontractor on a construction project, in the course of their employment, to engage in a concerted refusal to perform any services when the object of such inducement was to force a general contractor to cease doing business with another subcontractor. And see San Diego Trades Council v. Garmon, 353 U.S. 26, 77 S. Ct. 607, 1 L. Ed. 618, and Garmon v. San Diego Building Trades Council, ... Cal. ....., 320 P. 2d 473.

These authorities are controlling. The finding and conclusion of the trial court that the conduct of defendants was intended to compel plaintiff to coerce its employees to join the local union or lose their employment, contrary to SDC Supp. 17.1101 (1 & 2) finds ample support in the evidence. And, if interstate commerce were not involved, it is settled that, consistent with the Fourteenth Amendment, the trial court would have been permitted to enjoin such conduct. International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347. However, interstate commerce is involved and it is obvious the record would warrant a ruling by the National Labor Relations Board that defendants' conduct was proscribed as an unfair labor practice by No. 158 (b) (2 & 4) supra. Their conduct and their testimony offer support for a finding by a trier of the fact that they sought through peaceful picketing to bring economic pressure to bear on plaintiff and

cause it, by discrimination in regard to tenure of employment, to encourage its employees to join the local, and also to enhance that pressure on plaintiff, by inducing the employees of the general contractors, under whom plaintiff was working, to engage in a concerted refusal in the course of their employment to perform any services for the purpose and with the object of forcing those general contractors to cease doing business with plaintiff. It follows, as held in Garner v. Teamsters C. & H. Union, supra, that the exclusive primary jurisdiction to pass on this evidence and determine whether defendants' conduct constitutes an unfair labor practice and to decide whether remedial procedures should be initiated, rests in the National Labor Relations Board and hence the trial court was without jurisdiction to enjoin that conduct.

In contending that the trial court acted within its jurisdiction in enjoining the conduct of defendants, plaintiff rested heavily on Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691, wherein the court upheld the Wisconsin court and that state's Employment Relations Board in ordering an employer to cease and desist from giving effect to a maintenance-of-membership clause in a contract with the union. Wisconsin permitted such a contract where at least two-thirds of such employee voting in a referendum approve. No such referendum had been had approving the contract under which the employer acted. The employer's conduct in so doing constituted an "unfair labor practice" as defined by the Wisconsin statute. Resting its decision upon the proviso contained in No. 158(a)(3), which it said "merely disclaims a national policy hostile to the closed shop or other forms of union-security agreements" as clarified by No. 164(b) reading in part: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law," it held

there was no overlapping between the federal and Wisconsin provisions, and therefore that its Board and Courts operated within their powers. In Weber v. Anheuser-Busch, Inc., supra, 348 U.S. 468, at 477, 75 S.Ct. 480, 99 L.Ed. 546, the court pointed out the basis of its decision in Algoma Plywood and Veneer Co. in these words: "Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State." The conduct which was enjoined in the Algoma case by the state was not subject to control by the National Labor Relations Board as an unfair labor practice. Therefore, that decision is without controlling significance in a case, such as we are considering, in which the enjoined conduct of defendants is subject to control of the National Labor Relations Board as an unfair labor practice.

Review of the provision of the judgment awarding damages to plaintiff involves several questions to which we now turn.

The defendants contend that the Congress having preempted the jurisdiction of the courts to grant equitable relief against the exhibited conduct of defendants, it must have intended to preempt the jurisdiction of the state courts to impose sanctions by way of damages for injuries to business resulting from that conduct.

It is our understanding that the Supreme Court has expressed a contrary view in United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656, 74 S.Ct. 833, 91 L.Ed. 1025, and in International Union, United Automobile, Aircraft and Agricultural Implement Workers of America et al. v. Paul S. Russell, ...U.S....., 78 S.Ct. 932, ...L.Ed..... And see San Diego Building Trades Council v. Garmon, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed. 2d 618, and Garmon v. San Diego Trades Council, ...Cal....., 320 P. 2d 473. Therefore, we hold the contention to be inadmissible.

In the Laburnum case, supra, the court said, "Petitioners contend that the Act of 1947 has occupied the labor rela-

tions field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters Union, 346 U.S. 485, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from his right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result." And in that case it wrote, "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law."

The cause of action sounding in tort was tried to a jury. The court's instructions were predicated upon the constitution, statutes and decisions of the state. Request for ap-

plication of No. 303 61 Stat. 158, 159, 29 U.S.C.A. No. 187 (b), was not presented to the trial court in any manner.

Under assignments of error based on exceptions taken at the trial, the defendants attempt to assail many of the court's instructions. Space will not permit a reproduction of the many exceptions taken. A typical exception reads as follows: "The defendants and each of them take exception to the Court's Instruction No. 12, for the reason that said instruction does not correctly reflect the evidence and testimony adduced at trial, and that said instruction does not correctly reflect the laws of the State of South Dakota or the laws of the United States." Because such an exception fails to specify the grounds of defendants' objections to the instruction assailed, it is insufficient upon which to predicate error. By SDC 33.1318, dealing with the settlement of instructions, it is provided: "* * * On such settlement each counsel, or party, shall specify and state the particular ground or grounds upon which the giving or rejecting of any instruction is objected or excepted to. It shall be insufficient to state generally that an instruction does or does not state the law, but it shall be necessary to specify clearly wherein any instruction, or part thereof objected to, is insufficient or does not state the law." According to the theory and design of our rules of practice, error may not be predicated upon a ruling of a trial court unless the matter has been fairly placed before it for decision by specifically pointing out the ground of fact or law relied upon by the litigant. SDC 33.1601. It follows that this group of assignments is ineffective to present the questioned rulings for review.

By its pleading, motions for directed verdict and appropriate assignments of error the International has contended throughout that plaintiff has failed to establish its responsibility for the conduct of either the local or the manager. The contention is untenable.

The basic argument of the International is that its local unions are autonomous entities which are not authorized

to act for the International in organizational activities. We do not reach that argument. It is our view that the constitution of the International and by-laws of the local make the manager of the local the agent of the International in organizing the territory within the jurisdiction of the local, and that the conduct of which plaintiff complains is that of the manager and was indulged in the course and scope of his agency.

Included in the objects of the International, as set forth as a preamble to its constitution, is the object, "To organize all workers in the entire electrical industry, including all those in public utilities and electrical manufacturing, into local unions, to promote reasonable methods of work," etc. By its constitution it asserts jurisdiction over all electrical wage workers. It also provides for the officers of the locals among which is one denominated a "Business Manager". With reference to such a manager it provides, "The business manager shall be held responsible to the L.U. and to the I.P. for results in organizing his territory, • • • and for protecting the jurisdiction of the I.B.E.W." (L.U. is shorthand for the local, I.P. for the International President, and I.B.E.W. for the International.)

Among the powers which the International President is clothed by the constitution is the power "To remove or suspend any L.U. officer, representative, appointee, or agent, • • • for incompetence or for non-performance of duties, • • • or for failure to observe or carry out instructions or decisions of the I.P." The Vice President of International is required to hold one or more "progress" meetings yearly with the manager. The by-laws of the local which under the constitution must be approved by International contain a peculiar limitation on the powers of the board and officers of the local reading as follows: "The Executive Board or Local Union officers shall not interfere with the Business Manager in the performance of his duties."

The business manager admitted that he was engaged in "organizing" when he was negotiating with Baumgartners.

The inference is impelled that he was so engaged when directing all of the activities revealed by the record. The banner he placed in the hands of his pickets leaves no room for doubt as to the objective of those activities. It will be recalled that it read, "Electrical work on this job was not done by members of Local 426, I.B.E.W."

Organizational activities are the very lifeblood of unionism. Strength comes to a union from concerted action by a large proportion of the wage earners in a craft or industry, and from the flow of funds from the members to the local and upward to the supreme body. The constitution of International and the by-laws of the local provide for a variety of substantial fees, payments, assessments and dues, in all of which the International shares.

Because of the importance of this activity and therefore of the necessity that it receive constant, active and efficient attention, it is not surprising that International should desire a special agent in its major locals directly responsible to it for organizational work. International provided not only that the manager should be responsible to the International president for organizing his territory and subject to the instructions of that International officer, but it also provided that he be subject to removal by that officer for incompetency or failure to perform his duties.

We interpret the constitution of International as creating a relationship of principal and agent between it and the manager, and we hold the organizational activities revealed by this record to have been performed within the scope of his agency. United Mine Workers v. Patton, 211 F. 2d 742. The International is responsible for tortious conduct of its agent indulged within the course and scope of his employment. SDC 3.0309; 2 Am. Jur., Agency No. 360.

In support of its contention that it is not responsible for the conduct we are considering, International points to a provision of its constitution reading as follows, "No L.U. shall cause or allow a stoppage of work in any controversy of a general nature before obtaining consent of the I.P."

and rests heavily on the decision of the Supreme Court in United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975. In our opinion the holding is distinguishable because of the dissimilarity in the operative facts and the provisions of the controlling constitution.

Another contention of defendant is that the court erred in overruling their motion to strike plaintiff's claim for exemplary damages on the ground that "plaintiff has failed to show any conduct on the part of defendants of such a willful and malicious nature that warrants an award or submission to the jury of the question of exemplary damages under the statutes of South Dakota." Under our law exemplary damages are allowed "in addition to actual damages". SDC 37.1902. And see Annotations 33 A.L.R. 384 and 17 A.L.R. 2d 527. Hence this contention involves the sufficiency of the evidence to warrant an award of both compensatory and punitive damages. 15 Am. Jur., Damages, No. 270, p. 706.

It will be recalled that in each of the successive instances, to which reference is made supra, the placing of pickets resulted in an identical train of events. When the pickets appeared other crafts walked off from the project and it was shut down until the owner or general contractor had replaced plaintiff and its non-union men with union men; thereupon work resumed. To replace plaintiff and its non-union men the owner or general contractor was forced to breach plaintiff's subcontract. The manager admitted at the trial that he had talked with the managing agents of other crafts and may have asked their support. He also admitted that he called one owner, Mr. Reardon, and asked him to replace plaintiff with a contractor who would conform to union practices. These facts support, if they do not impel, the inference that the manager intended to cause the contractors or owners to breach their contracts with plaintiff. Moreover the circumstances as a whole offer reasonable support for a belief that if the injunction had not issued, and plaintiff had continued to refuse to bow

to the will of the manager he would have pursued it from job to job with the same tactic until he had utterly destroyed its business. Whether his objective was to require the plaintiff to replace its employees with members of the union, as the banner carried by the pickets would indicate, or merely to coerce it to enter into a contract, such as those received in evidence, whereby it would agree to impose union practices and terms of employment on his non-union men, and without their consent to designate the local as their bargaining representative, is not of controlling significance. In either event he was attempting to coerce plaintiff into doing that which is unlawful in this state.

By Chapter 92, Laws 1947, it is provided: Section (1) "• • • The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization." And section (2) "Any agreement relating to employment • • • which • • • denies, abridges, interferes with, or in any manner curtails the free exercise of the right to work by any citizen of the State of South Dakota, shall be deemed a violation of this Act."

Not only would these facts warrant a conclusion that the defendants were guilty of unlawful conduct in attempting to coerce the plaintiff into transgressing the law, but that they violated section 3 of the last cited act which reads, "Any request, demand or threat made by any person to any employer or employee to persuade or coerce such employer or employee to enter into an agreement violative of the provisions contained in Section 1 and 2 of this Act, shall be deemed a violation of this Act, and such person shall be punishable for a misdemeanor as hereinafter provided."

Plaintiff had a right to be free from this unlawful coercion and the consequent injury to its business, and the defendants were under a duty to abstain from so injuring plaintiff's business. SDC 47.0301. For such a willful and intentional harm to plaintiff the defendants are liable to it, not only for compensatory damages, SDC 47.0304, see

Lien v. Northwestern Engineering Co., 73 S.D. 84, 39 N.W. 2d 483, but, in addition thereto to exemplary damages. SDC 37.1902. Malice may be presumed in the circumstances. Bogue v. Gunderson, 30 S.D. 1, 137 N.W. 595, 36 Ann. Cas. 1915B, 126. The contention that exemplary damages should not have been awarded against International for the unauthorized or unratified conduct of its agent is not before us because it was not presented to the trial court.

Another contention of defendants is that plaintiff's proof of damages through loss of profits is speculative and insufficient to support the verdict. The contention is inadmissible. Guerini Stone Co. v. Carlin Constr. Co., 240 U.S. 264 at 280, 36 S.Ct. 300, 60 L.Ed. 636; Philadelphia, Wilmington and Baltimore R.R.Co. v. Howard, 13 How. 307 at 344.

In the case first cited it was written: "No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work." Such was the evidence adduced by plaintiff. Evidence of that character, in our opinion, is not speculative.

The final point made by the defendants is that the trial court erred in failing to grant a new trial on the ground that excessive punitive damages were granted under the influence of passion and prejudice. SDC 33.1605(5).

Our statute provides that "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, • • • the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant." SDC 37.1902.

The authorities agree that "There is no fixed standard for the measurement of exemplary or punitive damages; the amount of the award is a matter largely within the discretion of the jury • • • on due consideration of the attendant circumstances. 25 C.J.S. Damages No. 126, p. 737.

Elsewhere it has been written, "In assessing exemplary damages the nature, extent, and enormity of the wrong, the intent of the party committing it, and, generally, all the circumstances attending the particular transaction involved, including any mitigating circumstances which may operate to reduce without wholly defeating such damages, may be taken into consideration, * * *" 15 Am.Jur., Damages, No. 298, p. 739.

The trial court is vested with power to grant a new trial if such an award appears to have been given under the influence of passion or prejudice. SDC 33.1605(5). Recognizing that, as a participant in the trial, the trial court is best able to judge whether a verdict is the project of passion and prejudice, this court will not disturb its decision except for clear abuse. Stene v. Hillgren, 76 S.D. ....., 88 N.W.2d 109. And see Kunz v. Johnson, 74 S.D. 577, 57 N.W.2d 116.

The defendants point to the fact that the punitive award made by the jury is approximately six times as large as what is characterized as an over-liberal compensatory award. The innocence of wrongdoing of International is also asserted.

As the text quoted supra indicates the amount allowed as compensation to plaintiff is but one of the circumstances which should influence the conclusion of a jury in fixing the amount of the exemplary award. The amount allowed as compensation furnishes some measure of the enormity of the wrong of the defendant. In the circumstances at bar a jury of practical minds would recogize that plaintiff has actually suffered an unproved damage in loss of good will. It would be permitted to infer that the news of plaintiff's removal from job after job because of defendants' picketing would quickly circulate throughout the trade and would operate to deter owners, general contractors, and architects from seeking or recommending plaintiff's services. Hence, they could believe that the compensatory award failed to truly measure the seriousness of defendants' misconduct.

We turn to facts which it seems reasonable to believe the jury and the trial court deemed to be of controlling import in fixing the amount of the punitive award. The conduct of the manager and his relation to International need not be described anew. Neither need we emphasize that the jury and the trial court were justified in believing the harm to plaintiff was both designed and intentional.

At a time when plaintiff had been forced off from two projects, a hearing was had upon the application of defendants to dissolve a temporary restraining order. An International representative stationed at Omaha, Nebraska, with an assigned territory including Nebraska and part of South Dakota, appeared at that hearing with an attorney. It was there revealed that plaintiff had been taken off from two projects because of the picketing above described. The restraining order then in force was dissolved and the picketing was immediately resumed. This area representative was also present and sworn as a witness at the trial. His cross-examination includes these questions and answers: "Q. Well, will Mr. Baumgartner's operations be picketed in the future? A. I don't know. Q. By the I.B.E.W., I mean. A. I don't know. Q. In other words, they might. A. They could, yes; very likely." From the fact that this knowledge which was brought home to International through its area representative induced no interruption or change in the campaign the manager was waging against Baumgartners, and from the further fact that after the campaign had succeeded in removing plaintiff from eight projects, the area representative thought it likely the I.B.E.W. would continue picketing Baumgartners' operations, the inference was warranted that the manager was but executing policies established by International.

From the exhibits in evidence and from the testimony of the area representative the jury gained an insight into the probable tremendous monthly income International received from its members. If such a giant, and other like giants were to be deterred from employing traditionally

coercive organizational methods in South Dakota, the jury could reasonably conclude it needed to fix an exemplary award which would cause such activities to appear to be unprofitable. The case is sui generis. In a case involving physical coercion and greater actual damage a Virginia jury made a punitive award of $100,000. United Construction Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E. 2d 694. We have determined we cannot say that the trial court erred in concluding that passion and prejudice had not influenced the jury in making its exemplary award.

Other matters argued have been carefully considered but are deemed not to merit discussion.

Insofar as the judgment awards damages, it is affirmed; otherwise it is reversed.

All the Judges concur.

APPENDIX B

IN THE CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA } SS

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.,

Plaintiff,

vs.

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendants.

JUDGMENT

This action came on for trial at the regular January, 1956 term of this Court before the undersigned, Judge presiding, and the officers of the Court. The Plaintiff appeared by M. T. Woods, its attorney and the Defendants by Ray Dana and Herbert Dolgoff, their attorneys: The issues presented by Plaintiff's 2nd Cause of Action in its Supplemental Complaint were on motion of Plaintiff submitted to a jury. On motion of the Defendants the remaining issues were submitted to the Court upon the same evidence submitted to the jury.

The jury having been duly impaneled, accepted and sworn to try the issues on Plaintiff's 2nd Cause of Action in its Supplemental Complaint, and having heard the evidence, and the issues thereby presented being submitted to the jury upon the duly settled instructions of the Court, and the jury having rendered its verdict in favor of the Plaintiff and against the Defendants upon all of said issues,

finding that the Plaintiff is entitled to recover $3,177.84 actual damages, and $20,000.00 as exemplary damages, and said verdict having been duly received and filed herein;

And the Plaintiff having moved the Court for Findings of Fact and Conclusions of Law and Judgment, and the Court having directed the Plaintiff to prepare a proposed decision consisting of Findings of Fact and Conclusions of Law, and the same having been prepared and served upon the attorneys for the Defendants more than 5 days prior to this date, and the Court having made and filed its Findings of Fact and Conclusions of Law and the matter coming on to be heard upon application of the Plaintiff for Judgment thereon, and good cause therefor appearing, it is hereby on motion of M. T. Woods, Attorney for the Plaintiff, and all proceedings had and all records and files herein

ORDERED AND ADJUDGED that the Plaintiff, Baumgartner's Electric Construction Co., have and recovered judgment against the Defendants, Jim DeVries, Local Union No. 426 of the International Brotherhood of Electrical Workers, and the International Brotherhood of Electrical Workers, for the sum of $3,177.84, actual damages and $20,000.00 exemplary damages, amounting together to $23,177.84, together with the costs and disbursements of this action to be hereafter taxed and inserted herein by the Clerk of this Court in the sum of $100.35.

IT IS FURTHER ORDERED AND ADJUDGED AND DECREED that the Defendants Jim DeVries, O. E. Root, Local Union No. 426 of the International Brotherhood of Electrical Workers and the International Brotherhood of Electrical Workers, be, and they, and each of them, hereby are, premanently enjoined and restrained from picketing the Plaintiff, Baumgartner's Electric Construction Co. for the purpose of inducing or persuading the Plaintiff to curtail or interfere with the free exercise of the right to work of Plaintiff's employees, or to compel or coerce Plaintiff's employees to join the Union or to persuade the Plaintiff to

terminate the employment of any of Plaintiff's employees on account of membership or non-membership in any Labor Union.

Dated March 17th, 1956.

BY THE COURT:

JOHN T. MEDIN,
Judge

ATTEST:

M. J. SCHNEIDER,
Clerk

By KATHERINE ROST, *Deputy*

IN THE CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA } SS

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.,
Plaintiff,

vs.

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on the 7th day of February, 1956 before the undersigned, Judge presiding, and the officers of the Court. On motion of the Plaintiff before trial it was ordered that the issues presented by Plaintiff's second cause of action in its Supplemental Complaint herein betried by jury, and on motion of the Defendants it was ordered that all evidence received upon the trial by jury shall be deemed received for the purpose of trial of the issues triable to the Court. The Court having considered the evidence and arguments of counsel and being advised in the premises makes its findings of fact and conclusions of law as follows.

FINDINGS OF FACT

The Court finds

1. The Baumgartner Electric Construction Co. was at all material times and still is a South Dakota corporation engaged in the electrical contracting business. Local No. 426 of the International Brotherhood of Electrical Workers (herein called Local 426) is an association consisting of about 180 members and commonly known as a "local" of the Labor Union called the International Brotherhood of Electrical Workers which is herein referred to as the IBEW. The latter is an association comprised of many locals and having approximately 600,000 members, maintaining its head office in Washington, D. C. Each member pays a "per capita tax" of 70¢ per month which is collected by the Local and remitted to the International, the IBEW.

2. The Defendant, O. E. Root, was and is the President of said Local 426. The Defendant, Jim DeVries, was at all times material and still is the Business Manager of Local 426. The Defendants, Sodak Picket and Sinclair Picket, are unknown and were not served with process.

3. The constitution of the IBEW declares the object of said organization to be as follows:

> "The objects of the International Brotherhood of Electrical Workers are: To organize all workers in

> the entire electrical industry, including all those in public utilities and electrical manufacturing, into local unions, to promote reasonable methods of work,"

and other objects not here material. Said constitution defines "I.P." as "International President" and "L.U." as "Local Union". Article 19, Sec. 8 on Page 56 thereof provides as follows:

> "The business manager shall be held responsible to the L. U. and to the I. P. for results in organizing his territory, for establishing friendly relations with employers, and for protecting the jurisdiction of the I. B. E. W."

among other things.

4. The By-laws of Local Union No. 426 IBEW provide as follows:

> "The Business Manager shall perform such duties as are stated in Article XIX, Section 8 of the Constitution—and these by-laws—also such duties as may be assigned to him by the Local Union and which are not in conflict with the Constitution and these by-laws."

5. In May of 1955, the Defendant, DeVries, approached the President of the Plaintiff and requested that Plaintiff sign up a contract with the Defendant Union. He "explained the advantages of employing our people". The contract intended to be used provided for signatures by a representative of the employer, by the Business Manager for the Local and was "Subject to the approval of the International President" of the IBEW. Plaintiff's President advised DeVries that it had no objection to the employees joining the Union but the Union should start with the employees and not the employer. The Defendant, DeVries, replied that the Union might take in a couple of the employees on a "permit basis" but Plaintiff would have to get rid of the rest of its employees; and DeVries at no time asked or offered to permit any of Plaintiff's employees to join the Union. After two or more requests made by De-

Vries to Plaintiff's President to sign such a contract, and rejection of such requests by Plaintiff, the Defendants commenced picketing the Plaintiff in the manner and at the times and places hereinafter described. The proposed contract recognized the union as the sole bargaining agent for all employees of the employer, and specifically provided in paragraph 24, Page 7 thereof "material delivered to the job site in truck or carload lots shall be handled by members of the IBEW from the endgate or door of the vehicle through its ultimate use so far as possible", and its purpose, interpretation and effect were to require the Plaintiff to hire and employ only members of the Defendant Union.

6. Said Local 426, by action of its body, authorized and instructed its Business Manager, DeVries, to cause the Plaintiff to be picketed as hereinafter is found and described. The sign or banner employed in such picketing read substantially as follows:

> "Electrical Work on this job was not done by members of Local 426, IBEW".

7. In the latter part of July of 1955, the Defendants at the special instance of the Defendant, DeVries, picketed the building located at the intersection of East Sioux Street and Van Eps Avenue in process of construction for Sodak Distributing Co., at Sioux Falls, South Dakota and also picketed the job or building of Sinclair Oil Company, located at the intersection of 6th and Weber Streets, Sioux Falls, South Dakota.

8. In the latter part of August of 1955 the Defendants caused a building belonging to the Reardon Realty Co., located at 225-227 South Phillips Avenue, Sioux Falls, South Dakota, to be so picketed, and also a Conoco Service Station situated at 10th St. and Indiana Avenue in Sioux Falls, South Dakota, under construction by the Sioux Falls Construction Co., to be similarly picketed. In October, 1955 the Defendants caused two separate house jobs under construction by Swift Bros. Construction Co., located at 31st Street and Carter Place and 38th Street and Carter Place respectively, to be so picketed.

9. In each of the above instances the Plaintiff had a contract for the performance of the electrical work and for furnishing the electrical material for the building under construction. In each instance the Plaintiff was in the process of performing said contract at the time the picketing commenced and was carried on. In each instance the other workmen or crafts continued to work with the Plaintiff's employees until the picketing started, ceased working after the picketing started and returned to work after the picketing ceased and after the Plaintiff's employees had been removed from the job. About August, 1955 a conference was had with the Defendant DeVries and Business Agents of other Unions, at the Labor Temple in Sioux Falls, South Dakota in which it was proposed by one Swift that the Plaintiff and its employees be permitted to finish the work they had started, and then under construction, and if this were permitted he would promise not to give Plaintiff any future work. This proposal was rejected by the Defendant, DeVries, who said he would not approve or give his blessing to Union Workmen working with Non-Union Workmen. Swift Brothers Construction Co. later took steps to remove Plaintiff and its employees from Swift jobs and DeVries then said the jobs were "clean" and could proceed.

10. The Defendants, Local 426, and the IBEW through their representative, DeVries, knew that Plaintiff's employees were Non-Union Workmen. Defendants never solicited Plaintiff's employes for membership in the Union or offered the employees of the Plaintiff an opportunity to join the Union. The Defendants had reason to believe that other crafts would not work on a job if it was picketed, and this proved to be the case in each instance where picketing occurred, that is to say, the work slowed to a stop.

11. The representatives of the Defendant Union were present in the Court at the hearing on Plaintiff's Application for a Temporary Injunction at an early stage of this case, and then learned that as a result of their picketing Plaintiff had lost its contracts for the work at the places

picketed. From this and from the removal of the Plaintiff from each subsequent place picketed, and its replacement by a Union Electrical Contractor, Defendants knew that their picketing was effectively causing the termination of Plaintiff's contracts where picketed.

12. The campaign of picketing the Plaintiff is a continuing one. The Business Manager of Local 426 and the International Representative of the IBEW both testified that they did not know whether the Plaintiff would be picketed in the future and that Plaintiff might be so picketed.

13. It was the purpose of the Defendants to tie up Plaintiff's jobs, to compel the termination of Plaintiff's contracts for work and material on said jobs and to apply pressure on the Plaintiff in order to influence or make Plaintiff consent to be organized or to sign a Union Contract and to exert economic pressure on the Plaintiff to require its employees to join the Union or to discharge them or to hire only Union Members as employees doing electrical work.

14. At all times herein material the IBEW had a financial interest in the expansion of its membership in order to receive the dues and per capita taxes to be paid by them, which were $2.30 per month for "A" members and 70¢ per month for "B" members, "A" members paying $1.60 more than "B" members, which went to the Pension Fund. Local 426 had a similar financial interest in the collection of sums in addition to the foregoing, as shown by the evidence.

15. The International President of the IBEW has a broad power to require all other officers to perform their duties and to require Local Unions to observe the laws and rules of the IBEW. The action of the Defendants in picketing the Plaintiff as aforesaid was a part of the campaign of Local 426 and the IBEW to organize all electrical workers everywhere and was done in the usual and regular course of their business and was in furtherance of their stated object to organize all workers in the entire electrical industry and was also intended to influence, persuade or

compel the Plaintiff to influence or coerce its employees to join the Union or lose their employment by the Plaintiff and to require the Plaintiff to employ only members of the Defendant Union.

16. Plaintiffs volume of business has seriously fallen off and Plaintiff's business reputation has seriously suffered so that it has experienced increasing difficulty in obtaining contracts for work and construction. Plaintiff has suffered and will suffer irreparable injury unless such picketing be enjoined.

17. The Constitution of the IBEW declares the object of said organization to be as follows:

> "The objects of the International Brotherhood of Electrical Workers are: To organize all workers in the entire electrical industry, including all those in public utilities and electrical manufacturing, into local unions, to promote reasonable methods of work, to cultivate feelings of friendship among those of our industry, to settle all disputes between employers and employees by arbitration (if possible), to assist each other in sickness or distress, to secure employment, to reduce the hours of daily labor, to secure adequate pay for our work, to seek a higher and higher standard of living, to seek security for the individual, and by legal and proper means to elevate the moral, intellectual and social conditions of our members, their families and dependents, in the interest of a higher standard of citizenship."

18. That the proposed contract contained a provision designated as Section 11 as follows:

> "Sec. 11. Any provision of this agreement adjudged to be unlawful by any Court of competent jurisdiction shall be treated for all purposes as null and void, but such judgment shall not affect the validity of the remaining provisions thereof."

19. That the plaintiff purchased a total amount of supplies in the amount of $69,220.73; that of this amount, in

excess of $14,000.00 was purchased out of the state of South Dakota; that the plaintiff engaged in business relationships with the following companies located in Sioux Falls, South Dakota; Sinclair Oil Company, Reardon Realty Company, Conoco Oil Company, Swift Brothers Construction Company and Sioux Falls Construction Company; that Sioux Falls Construction Company purchased a total amount of supplies in the amount of $688,439.00 during the year 1955; that of this amount $166,461.00 was purchased out of the state of South Dakota and that Swift Brothers Construction Company purchased a total amount of $555,396.00 during the year 1955; that of this amount $16,327.00 was purchased outside the state of South Dakota; that picketing was carried on at various times at construction sites of the above companies.

CONCLUSIONS OF LAW

The Court concludes:

1. Section 2 of Article 6 of the Constitution of South Dakota provides that the right of persons to work shall not be denied or abridged on account of membership in any Labor Union or Labor Organization. SDC Supp. Ch. 17.11 prohibits contracts in violation thereof and forbids solicitation of such contracts. The contract solicited by the Defendants by its terms or by implication or effect was intended to deny, abridge or interfere with the free exercise of the right to work of Plaintiff's employees.

2. The action of the Defendants in picketing the Plaintiff as aforesaid was a part of the campaign of Local 426 and the IBEW and was done in the usual and regular course of their business, and was in furtherance of their object to organize all workers in the entire electrical industry, and was also intended to influence, persuade or compel the Plaintiff to influence or coerce its employees to join the Union or lose their employment by the Plaintiff and to require the Plaintiff to employ only Members of the Defendant Union.

3. In South Dakota an employer has no right to interfere with or in any manner curtail the free exercise of the right of his employees to work.

4. It was and is against the Law of South Dakota to request any employer or to persuade or coerce any employer to enter into an agreement violative of the constitutional provisions above quoted, or against the provisions of SDC Supp. Sec. 17.1101 Subsections (1) and (2). The evidence shows the solicitation or request of such a contract by the Defendants and that it was for the purpose of denying, abridging or interfering with the free exercise of the right to work of Plaintiff's employees; and such was against the Law.

5. Plaintiff has suffered and will suffer irreparable injury as the direct result of Defendant's picketing. The Defendants should be enjoined from continuing such picketing. Plaintiff's remedy at law is inadequate.

6. The Plaintiff is entitled to the Judgment of this Court permanently enjoining and restraining the Defendants from picketing the Plaintiff for the purpose of inducing or persuading the Plaintiff to curtail or interfere with the free exercise of the right to work of Plaintiff's employees, or to compel or coerce Plaintiff's employees to join the Union or to persuade the Plaintiff to terminate the employment of any of Plaintiff's employees on account of membership or non-membership in any Labor Union.

Let Judgment be entered accordingly.

Dated March 17th, 1956.

BY THE COURT

JOHN T. MEDIN,
Judge

ATTEST:

M. J. SCHNEIDER,
Clerk

BY KATHERINE ROST, *Deputy*

FILED MARCH 17, 1956

APPENDIX C

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA } SS

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.,
Plaintiff,

vs

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.
Defendants.

SECOND AMENDED SEPARATE ANSWER OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

* * * * * * * * *

COMES NOW the International Brotherhood of Electrical Workers and for its amended separate answer to the Complaint and the Supplemental Complaint of the above named Plaintiff states and alleges:

I

That the Complaint and the Supplemental Complaint fail to state a claim upon which relief can be granted in favor of the Plaintiff and against this Defendant.

II

That the Court does not have jurisdiction to hear and determine this cause and is without jurisdiction to enter any restraining order or any injunction whatsoever against the Defendants above named; that any such order would be unconstitutional, null and void in that it would deprive the union and its members of liberty to contract, and of their

property without due process of law; that it would permit involuntary servitude; that it would deprive the union and its members of the constitutional right of free speech, the right of assembly and the right of consulting for the common good; that such restraining order or injunction would be in violation of and repugnant to Article I, Section 8, and Article VI and Section 1 of the 14th amendment to the Constitution of the United States of America.

That said restraining order or injunction as prayed for would be repugnant to and in direct conflict with the provisions of the National Labor Relations Act, as amended, and that it would be in violation of rights conferred and duties imposed by the aforesaid superior federal legislation, to wit: the National Labor Relations Act, as amended, also designated as the Labor Management Relations Act, 61 statutes 136, 29, U. S. C. Supplement, Sections 141 to 197 inclusive.

That the Complaint alleges activities on the part of this Defendant and all other Defendants that might be held to constitute one of the unfair labor practices enumerated in Section 8 (b) of the National Labor Relations Act, as amended; that this Defendant alleges that the power to determine that question and the action that can be taken in the matter are to be vested in a single agency, namely, the National Labor Relations Board, in order that thereby a uniform national labor relations policy might be developed and enforced; this Defendant alleges that the activity complained of in Plaintiff's Complaint is an activity that brings the parties within the sole and exclusive jurisdiction of the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act, as amended; that the activity complained of in Plaintiff's Complaint is one that is solely within the jurisdiction of said National Labor Relations Board; and Congress by passing said labor management relations act assumed exclusive jurisdiction and completely pre-empted the field of labor relations as to industries that affect interstate commerce; that Defendant further alleges that the Plaintiff is engaged in activi-

ties in interstate and intra-state commerce and is within the purview of and subject to the provisions of the National Labor Relations Act, as amended.

III

That from the Complaint it appears that this Court is without jurisdiction to enter any restraining order or injunction denying the Defendants the right to peaceful picketing under the provisions of SDC 17 or any acts amendatory thereto without strict proof that the Defendants have or will, by picketing, seek to compel Plaintiff to perform an illegal act, or without strict proof that picketing by any of the Defendants is for an illegal purpose; that such a restraining order or an injunction against this Defendant would be unconstitutional, null and void, in that it would deprive the union and its members of liberty to contract, and of its property without due process of law; that it would permit involuntary servitude; that it would deprive the union and its members of the constitutional right of free speech, right of assembly, and right of consulting for the common good; that any such restraining order or injunction would be in violation of and repugnant to the Constitution of the United States and its amendments, and in particular the 14th Amendment; and that the Court is without jurisdiction to award damages to the Plaintiff for all the reasons and causes above cited.

IV

Expressly denies each and every matter, allegation and thing set forth and contained in said Complaint and the Supplemental Complaint of the Plaintiff save and except those matters and things which are hereinafter specifically admitted.

V

Admits paragraphs 1, 2, 3, and 5 of the Plaintiff's Complaint.

VI

Has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 of the first cause of action in the Supplemental Complaint of the Plaintiff and subparagraphs 1 and 2 of paragraph 1 of the second cause of action in Supplemental Complaint of the Plaintiff.

VII

Admits paragraphs 3, 4, and 6 in the first cause of action of the Supplemental Complaint and subparagraphs 3, 4, and 6 of paragraph 1 in the second cause of action of the Supplemental Complaint.

WHEREFORE, Defendant International Brotherhood of Electrical Workers prays that the Complaint and Supplemental Complaint of the Plaintiff be dismissed and that this Defendant recover its costs and disbursements herein.

DANA, GOLDEN, MOORE & RASMUSSEN AND
DAVID D. WEINBURG

BY RAYMOND E. DANA

Attorneys for the Defendant International Brotherhood of Electrical Workers
812 Nat'l Bank of S. Dak. Bldg.
Sioux Falls, South Dakota

APPENDIX D

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA } SS
COUNTY OF MINNEHAHA }

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.,
Plaintiff,

vs

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * * * * * * *

FINDINGS OF FACT

The Court finds

1. The Constitution of the IBEW declares the object of said organization to be as follows:

> "The objects of the International Brotherhood of Electrical Workers are: To organize all workers in the entire electrical industry, including all those in public utilities and electrical manufacturing, into local unions, to promote reasonable methods of work, to cultivate feelings of friendship among those of our industry, to settle all disputes between employers and employes by arbitration (if possible), to assist each other in sickness or distress, to secure employment, to reduce the hours of daily labor, to secure adequate pay for our work, to seek a higher and higer standard of living, to seek security for the individual, and by legal and proper means to elevate the moral, intellectual and

social conditions of our members, their families and dependents, in the interest of a higher standard of citizenship."

2. In May of 1955, the defendant, DeVries, approached the president of the plaintiff and requested that plaintiff pay the wage scale and conditions of employment generally paid by electrical contractors in the area: DeVries never requested that president of the plaintiff to sign a contract making membership or non-membership in Local 426 a condition of employment for the plaintiff's employees nor did he request at any time of the plaintiff that his employees join the union or become members of the union. That the purpose and effect of defendants request was not to require the plaintiff to hire and employ only members of the defendant union, but only to maintain union standards in the area; that at no time did defendant, DeVries, propose or offer to the president of the plaintiff any collective bargaining agreement; that DeVries never presented to Baumgartner, president of the plaintiff any specific contract but stated that the union was negotiating a contract with the NECA (National Electrical Contractors' Association, Sioux Falls Division of the Dakota Chapter) and that this contract had not been reduced to writing and that when it was, he would like to have the president of the plaintiff sign or go along with the contract; that the agreement that was finally reduced to writing would not have within its provisions a clause requiring membership in the union as a condition of employment. That the proposed contract contained a provision designated as Section 11 as follows:

"Sec. 11. Any provision of this agreement adjudged to be unlawful by any Court of competent jurisdiction shall be treated for all purposes as null and void, but such judgment shall not affect the validity of the remaining provisions thereof."

3. That after the meetings of defendant, DeVries, with the president of the plaintiff and after the local union had ascertained that the plaintiff had continued paying a wage

scale inferior to the scale paid by contractors in the area who had recognized the local union, and had continued with the same conditions of employment as the plaintiff had previously, the local union, after obtaining the advice of their attorney who instructed them that such was legal under the laws of the state of South Dakota, the local union instructed DeVries to commence the picketing and at the insistence and request of the local union, picketing was commenced. That the purpose of the picketing was for the purpose of having the plaintiff comply with the union standards in the area, which standards did not require the employees of such employer to join a union as a prerequisite of their employment, and for the further purpose of advertising the fact that plaintiff was not operating in accordance with union standards.

4. That all actions taken by DeVries and other officials of local 426 were not authorized nor sanctioned by the International Union; that none of the activities of defendant, DeVries, and any other official of the local union, was under the direction and control of the International Union or any international officer nor was their activity under the direction and control of Garrity, International Representative of the IBEW; that Local 426 is a self-autonomous affiliation of the IBEW existing by reason of a charter granted by the IBEW, having its own officers, separate and distinct from those of the International Union.

5. That the plaintiff purchased a total amount of supplies in the amount of $69,220.73; that of this amount, in excess of $14,000.00 was purchased out of the state of South Dakota; that the plaintiff engaged in business relationships with the following companies located in Sioux Falls, South Dakota; Sinclair Oil Company, Reardon Realty Company, Conoco Oil Company, Swift Brothers Construction Company and Sioux Falls Construction Company; that Sioux Falls Construction Company purchased a total amount of supplies in the amount of $688,439.00 during the year 1955; that of this amount $166,461.00 was purchased out of the state of South Dakota and that Swift Brothers Construc-

tion Company purchased a total amount of $555,396.00 during the year 1955; that of this amount $16,327.00 was purchased outside the state of South Dakota; that picketing was carried on at various times at construction sites of the above companies; that the business activities of all the companies together with the plaintiff affected interstate commerce and that all the companies, including plaintiff were engaged in commerce.

6. That all the contracts with Swift Brothers Construction Company, Reardon Realty Company, and Sioux Falls Construction Company were terminated by mutual consent and that plaintiff was paid all that he demanded from such companies; that plaintiff voluntarily terminated the contracts at the specific instance and request of Swift Brothers Construction, Sioux Falls Construction Company and Reardon Realty Company; that there is no evidence of damages in an amount certain or unspeculative and no evidence that plaintiff and its employees were not actively engaged in and gainfully employed in other work on other jobs at all times subsequent to cessation of work under the contracts involved herein; that further there is no evidence that any persons employed on said jobs, including employees of the plaintiff, were under the direction and control of the defendant unions, its officers or agents, or in fact, that they were members of or under the direction and control of any other labor unions.

7. That the picketing described aforesaid was commenced after this court dissolved a temporary restraining order against the defendants and on behalf of the plaintiff and after the defendant local union sought out and obtained the advice of their attorney, and upon obtaining his advice that such picketing and proposed picketing signs were lawful within the laws of the state of South Dakota and the United States, the picketing was commenced. That at the time of the trial and for some time prior thereto, defendant local union had not picketed the plaintiff and that there was no threat of future picketing. That during the period of the temporary restraining order and before its dissolution,

no picketing was carried on by the defendant local union or its agents. That the defendants never intended to influence, persuade or compel the plaintiff to influence or coerce its employees to join the union or lose their employment or to require the plaintiff to employ only members of the union.

CONCLUSIONS OF LAW

The Court Concludes:

1. That the court has no jurisdiction to grant the relief and damages as prayed for, for the same would be repugnant to and in direct conflict with the provisions of the National Labor Relations Act, as amended, and it would be in violation of the rights conferred and duties imposed by the aforesaid superior federal legislation to wit: the National Labor Relations Act, as amended, also designated as the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C.A. Supp., Sections 141 to 197 inclusive. That the activity complained of is an activity that brings the parties within the sole and exclusive jurisdiction of the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act, as amended.

2. That the plaintiff is engaged in an industry that affects commerce and is in commerce within the meaning of the National Labor Relations Act, as amended; that the employers with whom plaintiff dealt and with whom he contracted for work to be performed are also engaged in industry that effects interstate commerce and are in commerce within the National Labor Relations Act, as amended.

3. That South Dakota Supp., Ch. 17.11 is unconstitutional, null and void and that it is in violation of the First, Fifth, Thirteenth and Fourteenth amendments to the Constitution of the United States of America and to the applicable provisions of the Constitution of the state of South Dakota. That this chapter, being an enabling statute, for Section 2, Article VI of the Constitution of the State of South Dakota, is unconstitutional, null and void and that its provisions are more inclusive than the rights and prohibitions granted in the constitutional amendment.

4. That the court does not have jurisdiction to hear and determine this cause and is without jurisdiction to enter any restraining order or any injunction whatsoever against the defendants above named; that any such order would be unconstitutional, null and void in that it would deprive the union and its members of liberty to contract, and of their property without due process of law; that it would permit involuntary servitude; that it would deprive the union and its members of the constitutional right of free speech, the right of assembly and the right of consulting for the common good; that such restraining order or injunction would be in violation of and repugnant to Article I, Section 8 and Article VI and Section 1 of the 14th amendment to the Constitution of the United States of America.

5. That the action of the defendants in picketing the plaintiff as aforesaid was for the purpose of inducing plaintiff to sign or agree to comply with the terms and standards of the contract which by its terms does not require the employee of the plaintiff to join a union as a prerequisite to his employment or right to work and is not violative of any of the constitutional provisions of the laws of the State of South Dakota.

6. That local union no. 426 is self-autonomous and is separate and distinct from the IBEW in carrying out their actions and policy and that the IBEW did not act in concert with or jointly engaged with Local 426 in any of the picketing complained of. That local union no. 426 acted as its own free agent in instituting the picketing complained of.

7. Section 2 of Article VI of the Constitution of South Dakota provided that the right of persons to work shall not be denied or abridged because of membership in any labor union or labor organization. The contract solicited by the defendants and the pursuing picketing is not violative of any of the plaintiff's rights and that, therefore, plaintiff may not base a cause of action against these defendants for a violation of this constitutional amendment.

8. Plaintiff's damage is not irreparable and that he has an adequate remedy at law.

9. That plaintiff is not entitled to the judgment of this court permanently enjoining and restraining the defendants from picketing the plaintiff for the activity for the purpose as was disclosed by the evidence; nor is the plaintiff entitled to recover the judgment as found by the jury verdict.

Let judgment be entered accordingly.

Dated this ——— day of March, 1956.

BY THE COURT:

Judge.

The above and foregoing findings of fact and conclusions of law were by the court refused this 17th day of March, 1956.

JOHN T. MEDIN,
Judge

ATTEST:

Clerk.

APPENDIX E

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA SS

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.,
Plaintiff,

vs.

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendant.

ASSIGNMENTS OF ERROR

• • • • • • • • •

Defendants and Appellants Jim DeVries, O. E. Root, Local Union No. 426 of the International Brotherhood of Electrical Workers and the International Brotherhood of Electrical Workers hereby give notice of and make the following Assignments of Error upon which they will rely and claim to have been made in the trial of the above entitled action, including defendant's motions for directed verdict, and in the making of Findings of Fact, Conclusions of Law and Judgment by the trial court in favor of the Plaintiff and against the Defendants and in the denial of the Defendant's motions for judgment notwithstanding the verdict and for a new trial.

(Numbers in parenthesis refer to pages of the transcript)

• • • • • • • • •

Assignment of Error No. 2

The Court erred in denying the motion made by all of the Defendants for a directed verdict at the end of the Plaintiff's case, which motion was as follows:

"Mr. Dana: All of the defendants, the plaintiff having rested, move the Court for a directed verdict in their favor and against the plaintiff for the following reasons: That the Court is without jurisdiction to enter any restraining order or any injunction whatsoever against the defendants above named or to find damages for the plaintiff and against the defendants above named, in that any such order would be unconstitutional, null and void in that it would deprive the union and its members of liberty to contract and of their property without due process of law; that it would permit involuntary servitude; that it would deprive the union and its members of the right of free speech, the right of assembly, and the right of consulting for the common good; that any such order or judgment would be in violation of and repugnant to Article 1, Section 8, and Article 1, Section 1 of the Fourteenth Amendment to the Constitution of the United States; that there is no evidence to show that there has been any violation of the rights of the plaintiff or the employees of the plaintiff. They have not been deprived of any of their constitutional rights. There has been no showing they have been deprived of their right to work under our law by virtue of any acts or conduct on the part of the defendants. There is no showing that there has been any willful or malicious acts on the part of the defendants to in any way interfere with or impede the work and right to work of the plaintiff or any of the plaintiff's employees. The evidence affirmatively shows that there has been no act or threat against any of the employees of the plaintiff or against the plaintiff itself; that on many of these jobs where the picketing did take place, the evidence shows that the plaintiff and his men worked there after the picketing had started, worked there weekends, worked their nights without any interference from any of the defendants. The evidence affirmatively shows that the defendants were not responsible

> for nor could they control the acts or conduct of other employees working on these jobs; that they have no jurisdiction over or control of those other employees; that they, at no time of any of these acts, complained of any of the members of the Electrical Workers Local 426 being on those jobs."

the denial of said motion being prejudicial to all of the Defendants for all the reasons stated in the motion and because thereby the jury and court were given the opportunity to render a decision in favor of the Plaintiff upon the two causes of action herein. (185–187)

Assignment of Error No. 3

The Court erred in denying the Defendant's motion to strike the Plaintiff's request for exemplary damages from the Complaint by all of the Defendants at the end of the Plaintiff's case, which motion was as follows:

> "Mr. Dana: I would like to move the Court at this time that the Plaintiff's request for exemplary damages be stricken from the Complaint on the grounds that the plaintiff has failed to show any conduct on the part of the defendants of such a willful and malicious nature that warrants an award or the submission to the jury of the question of exemplary damages under the statutes of the State of South Dakota."

the denial of said motion being prejudicial to the Defendants for all of the reasons stated in the motion and because thereby the jury was given the opportunity to render a decision in favor of the Plaintiff upon his prayer for exemplary damages. (187–188)

Assignment of Error No. 4

The Court erred in denying the motion of the Defendant International Brotherhood of Electrical Workers for a directed verdict at the end of all the evidence which motion was as follows, to wit:

"Mr. Dana: Your Honor, at this time I would like to renew my motion on behalf of the International Brotherhood of Electrical Workers for all of the reasons set forth in the motion made at the time that the plaintiff rested, and further on the grounds that there has been no proper showing of any damages by the plaintiff; that any testimony in regard to damages is of a highly speculative nature. That in addition to that, the plaintiff has specifically stated he has not waived his claims against the contractors themselves and if he is entitled to damages of any kind, that his initial primary claim for damages is against the contractors themselves for breach of contract. For the further reason that there is no agency relationship, no joint or concerted action shown on the part of the plaintiff as against the defendant International Brotherhood of Electrical Workers in connection with the picketing which was admittedly carried on by the Local Union No. 426; and for all of the constitutional reasons that have been raised in the Answer.

"Mr. Dana: Your Honor, I neglected one additional reason in both of these motions that I would like to insert.

"The Court: Very well.

"Mr. Dana: Further on the grounds that this Court is without jurisdiction to hear and determine this matter because it is involving inter-state commerce and comes under the province of the National Labor Relations Board."

said action of the Court being prejudicial to the Defendant International Brotherhood of Electrical Workers for the reasons stated therein and for all the reasons advanced in the motion set forth in Assignment of Error No. 1. (237-239)

Assignment of Error No. 5

The Court erred in denying the motion of all of the Defendants for a directed verdict at the end of the evidence, which motion was as follows, to wit:

"Mr. Dana: Your Honor, and the defendants other than the International Brotherhood of Electrical Workers renew their motion made at the time that plaintiff rested for all the reasons set forth in said motion and for all the constitutional reasons raised in the defendants' Answer, and for all of the reasons specifically set forth in the previous motion insofar as pertaining to damages and right of action of the plaintiff to recover damages against any of the defendants herein, and we ask that the International Brotherhood of Electrical Workers, as a defendant, be joined in that motion in the event that your ruling on the previous motion is adverse to the defendant.

"Mr. Dana: Your Honor, I neglected one additional reason in both of these motions that I would like to insert.

"The Court: "Very well.

"Mr. Dana: Further on the grounds that this Court is without jurisdiction to hear and determine this matter because it is involving inter-state commerce and comes under the province of the National Labor Relations Board."

said action of the Court being prejudicial to the Defendants for the reasons stated therein and for all the reasons advanced in the motion set forth in Assignment of Error No. 2. (238–239)

• • • • • • • • • •

Assignment of Error No. 46

The Court erred in refusing to adopt Defendants' Proposed Conclusion of Law No. 1, reading as follows:

"That the Court has no jurisdiction to grant the relief and damages as prayed for, for the same would be repugnant to and in direct conflict with the provisions of the National Labor Relations Act, as amended, and it would be in violation of the rights conferred and

duties imposed by the aforesaid superior federal legislation to wit: the National Labor Relations Act, as amended, also designated as the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C.A. Supp., Sections 141 to 197 inclusive. That the activity complained of is an activity that brings the parties within the sole and exclusive jurisdiction of the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act, as amended."

said refusal being erroneous and prejudicial to the Defendants because it was the only Conclusion which was supported by the undisputed evidence, and said Conclusion, if adopted, would have required entry of Judgment in favor of the Defendants and against the Plaintiff upon Plaintiff's first cause of action, in which plaintiff sought an injunction.

• • • • • • • • •

Dated this 25th day of September, 1956.

DANA, GOLDEN, MOORE & RASMUSSEN
of Sioux Falls, South Dakota

and

DAVID D. WEINBERG
of Omaha, Nebraska

By RAYMOND E. DANA
Attorneys for the Defendants

APPENDIX F

The Labor-Management Relations Act, 1947, as amended, (61 Stat. 136, 29 U.S.C. 141 *et seq.*) provides in pertinent part:

"SEC. 2. When used in this Act—

• • • • • • • • • •

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

• • • • • • • • • •

"SEC. 8.

• • • • • • • • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • • • • • • •

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • • • • • • • • •

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an

object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * * * * * *

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

SOUTH DAKOTA RIGHT-TO-WORK ACT

Sec. 17.1101. Closed Shop Prohibited.—[*Sec. 1.*] No person shall be deprived of life, liberty, or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

[*Sec. 2.*] Any agreement relating to employment, whether in writing or oral, which by its stated terms, or by implication, interpretation, or effect thereof, directly or indirectly denies, abridges, interferes with, or in any manner curtails the free exercise of the right to work by any citizen of the State of South Dakota, shall be deemed a violation of this Act.

[*Sec. 3.*] Any request, demand or threat made by any person to any employer or employee, to persuade or coerce such employer or employee to enter into an agreement violative of the provisions contained in Sections 1 and 2 of this Act, shall be deemed a violation of this Act, and such person shall be punishable for a misdemeanor as hereinafter provided.

[*Sec. 4.*] Any solicitation or request to join a labor organization made by any person to any employee, accompanied by threats of injury to such employee or members of his family, or damage to property, or loss or impairment of present or future employment of such employee, shall be deemed a violation of this Act, and such person shall be punishable for a misdemeanor as hereinafter provided.

Sec. 17.9914. Denial of the Right to Work; Misdemeanor; Penalty; Duty of States Attorney to Enforce Law.—Violation of any of the provisions of Sec. 17.1101 shall constitute a misdemeanor and upon conviction will be punishable by a fine of not more than three hundred dollars or imprisonment not to exceed ninety days, or both, in the discretion of the court. Each violation shall constitute a separate offense.

It shall be the duty of the states attorney of every county to prosecute all persons violating any of the provisions of section 17.1101 in his county, and he shall be responsible for the proper enforcement of such section, and whenever he shall have any information or knowledge or have any reason to believe that any of the provisions of such section are being violated in his county, he shall investigate the same and use every legitimate means at his command to secure the necessary and proper evidence of such violation, and immediately upon securing such evidence, he shall file a complaint or preliminary information against any person against whom he shall have any evidence of any such violation, and he shall have such person arrested and shall vigorously prosecute such charges to final judgment.

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Office Supreme Court, U.S.
FILED
DEC 30 1958
JAMES R. BROWNING, Clerk

No. 551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners*,

VS.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MELVIN T. WOODS,
301 *South First Avenue*,
Sioux Falls, South Dakota,
Attorney for Respondent

O'CONNOR COMMERCIAL PRINTERS — 7 — SIOUX FALLS, SOUTH DAKOTA

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IN THE

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JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners*,

VS.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

CITATION

The opinion of the Supreme Court of South Dakota, which the petitioner here seeks to review, is reported in the September 24, 1958, advance sheet of the Northwestern Reporter. The citation is 91 N.W. (2d) 663.

EXPLANATION OF THE NATURE OF THE CASE

Counsel for the petitioner has misapprehended the character of the judgment entered in this case. They have needlessly included in their petition as appendices* B and D, pages 23A and 36A, the Findings of Fact and Conclusions

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* *All references to Appendices herein are to the Appendices in Petitioner's Brief.*

of Law of the trial court and defendant's proposed Findings of Fact and Conclusions of Law. As indicated by the State Court's decision (bottom of page 11A of petitioner's statement), the cause of action sounding in tort was tried to a jury. Only that part of the judgment based on tort and awarding damages was affirmed. Otherwise the judgment was reversed. (Petitioner's Brief, page 20A).

The cause of action tried to the jury resulted in a verdict for the plaintiff reading as follows:

> "We, the jury, duly empanelled and sworn to try the above entitled action, find for the plaintiff upon all the issues in the case, and against the defendant and assess plaintiff damages at $3,177.84, actual damages, and $20,000.00 as exemplary damages, amounting in all to $23,177.84. Dated this 9th day of February, 1956."

This was not an advisory verdict. It was the result of the trial of a law action.

The judgment is based on this verdict, which in turn is based on the second cause of action of plaintiff's Supplemental Complaint. This Supplemental Complaint, after describing the parties defendant, alleged that defendants well knew that no union man will work on a picketed job, and that any such picketing constitutes a signal to other workers to quit (Paragraph 8, first cause of action); that plaintiff was picketed repeatedly after it advised the defendant that it could not sign a union contract unless plaintiff's employees requested (Paragraph 10); that defendants well knew none of plaintiff's employees were members of the union and never invited any of them to join; knew that plaintiff could do nothing to influence them (Paragraph 11); that this picketing was to coerce the plaintiff *and* to damage or destroy plaintiff's business and was willful and intentional (Paragraph 12).

The foregoing allegations of the first cause of action were incorporated in the second cause of action by refer-

ence. The latter repeats that this course of action was for the purpose of seriously damaging or ruining or destroying the plaintiff (Paragraph 2), that plaintiff had contracts for electrical work with various construction contractors (Paragraphs 3, 4, 5 and 6) which the defendants picketed consecutively, causing the termination of such contracts; that South Dakota had declared it policy in a right to work law (Paragraph 7), that defendants willfully and maliciously took the described action to compel plaintiff to hire only union workers or suffer the consequences; that this conduct was malicious (Paragraph 8); that the defendants dogged plaintiff from job to job causing loss of contracts, and will continue to do so unless deterred by the imposition of more than ordinary damages. The complaint prayed for $3,177.84 actually damages and $25,000.00 exemplary damages.

As the Court's Opinion and the record show, these issues were fully supported by the evidence. The Court's instructions were responsive to these issues. No claim of error is premised on these instructions.

In South Dakota the doctrine of liability for interference with contracts is established. In the case of *Lien v. N.W. Engineering Co.* (1949), 73 S.D. 84, 39 N.W. (2d) 483, it is said:

> "One who intentionally and without reasonable justification or excuse induces one of the parties to a contract to refuse to perform according to the terms thereof, with resulting damage to the other party to the contract, may be held liable in an action to recover such damage. 30 Am. Jur., Interference, Section 18 et seq. 84 A.L.R. 43."

This was a common law action involving neither statute nor Constitutional provision. The trial court embodied this rule in its instructions 10 and 11.

The verdict and judgment in this respect are based on what this court has referred to as "common law rights of action." *International Union vs. Russell*, 356 U.S. 634, 28 S.Ct. 932.

NO REVIEWABLE QUESTIONS PRESENTED

Respondent respectfully suggests that no reviewable question has been preserved or is presented by this Petition for Certiorari. Under Division 1, page 4 of the Petition, it is asserted that the Federal questions presented were raised by the Second Amended Answer, Proposed Findings and Conclusions and Assignment of Errors. Turning to the Second Amended Answer, Appendix C, page 32A, it is seen that this presents a number of questions not urged in the Petition for Certiorari and that the only Federal question argued is that Congress by enacting the NLRA pre-empted the field of labor relations affecting Interstate Commerce (Bottom page 33A). Since the judgment is not bottomed upon Findings of Fact or Conclusions of Law and this phase of the case was ruled in petitioner's favor, Findings and Conclusions made by the trial court and those requested by petitioner are not germane here. Turning to the Assignments of Error, Appendix E, page 43A, it is seen that Assignments 2 and 3 present no Federal question urged in the Petition. Assignment 4 is based upon a Motion for Directed Verdict on the ground that the trial court was without jurisdiction "because it is involving Interstate Commerce and comes under the province of the National Labor Relations Board." We find the same language near the end of Assignment 5, page 47. Assignment 46 is ineffective because, as above indicated, it is premised upon denial of a Conclusion of Law. This had to do with the injunction phase of the case, which was ruled in favor of the petitioner. We are here concerned only with the jury verdict which depends not at all on the Findings and Conclusions of the Court.

It thus clearly appears that the above quoted language in regard to pre-emption of the field of labor relations by Congress is all petitioner can point to as the basis of the arguments made in the petition; and it is wholly insufficient. It fails completely to give counsel or the Court notice of what is now argued.

DISCUSSION OF PETITIONER'S "QUESTIONS PRESENTED"

We believe the assertion in paragraph 1, page 4, of petitioner's description of "Questions Presented," that the action was based on violation of a State statute relating solely to labor-management is incorrect. South Dakota has no labor-management relations act in the sense of a comprehensive code regulating such matters, similar to the NLRA. It does have constitutional and statutory provisions guaranteeing the right to work. The statute is quoted in the Appendix of the petition, page 51A. The constitutional provision is quoted by the South Dakota Supreme Court in its opinion. See page 4A of the Appendix. These do not provide a remedy for breach. But

> "'. . . the violation of a statutory provision containing . . . the prohibition . . . of an act which may be to his injury is generally regarded as giving rise to a . . . right of action.' 52 Am. Jur. Torts Sec. 18, page 372."

This is the basis of Respondent's common law action.

Paragraph 2, page 2 under this same heading describes subsidiary questions similarly, as not predicated upon a common law action, but upon a state law relating solely to Labor-Management relations, or where damages sought are incidental and ancillary to injunctive relief. This was not the situation. The action for damages was a separate independent tort action, gist of which was interference

with contract. This was not a case where as an incident of an equitable or injunction action the court was asked to award damages. The tort action was separately and specially tried to a jury.

Paragraph 3 asks whether the state court has jurisdiction to award damages where compensation may be secured by an action at law under the Federal Statute. This question clearly was not raised either in the Trial Court or in the Supreme Court of South Dakota, as a search of the record will reveal. See statement of the South Dakota Supreme Court at the top of page 12A of the Appendix.

Paragraph 4 of questions presented seeks to raise some question of agency relating to LMRA. This is new in the Petition for Certiorari. There is no basis for it in the record nor in the Assignments of Error relied on (Appendix E, page 43A).

Paragraph 5 questions the jurisdiction to award exemplary damages on the same grounds. This, too, is new in the Petition for Rehearing. It was not raised anywhere below.

THE FACTS

A few points need to be cleared up as to the facts of the matter.

The defendant, DeVries, business manager of Local 426 IBEW, solicited the plaintiff for a union contract without contacting any of defendant's employees. He knew none of them were members of the union, although the record shows one of them tried unsuccessfully to get in. DeVries' position was that the union might take one or two "on a permit," which is something less than membership. They could not continue work for plaintiff and the rest would have to be replaced. Plaintiff said it was up to the men. As soon as the union had a majority he would sign a contract. The situation did not change, so that on subsequent requests

plaintiff's position was consistent. It could not sign a contract. There is no question but what DeVries was asking for a union shop contract, or that his position was that he would never permit union men to work on the same job with nonunion men.

Following plaintiff's third refusal to sign a contract the picketing commenced. After plaintiff had been run off of two jobs he applied to the Court for a Restraining Order. That order was dissolved on the return date because the evidence showed that contracts on the picketed jobs had been terminated, so the trial court felt the point was moot. Robert Garrity, District Agent for the International, was present at this hearing with Mr. Weinberg, his attorney, so he fully understood the whole situation The record shows that he was in touch with DeVries from time to time by telephone and personally and he supervised the International's business in South Dakota. So the International was not without knowledge of what was going on. It had a representative in close touch with the situation. Baumgartner's were run off of six jobs after Garrity was present in Court. The International gets 70c a month per capita tax from each member of the union.

DeVries testified to his duties and identified the Constitution of the International and the by-laws of the Local, which went into evidence without objection. He said some of the money from dues is used for organizational purposes —"organizing contractors and places of business that are not organized." And of his conversation with Baumgartner, "I tried to quote him the merits or what I thought would be the merits of running a shop that would be—employ our people."

The South Dakota Supreme Court has summarized the evidence supporting the agency of DeVries for the International at page 13A of the Appendix of the petition. The evidence in the record spells out this agency with particu-

larity. Greatly simplified it amounts to this. DeVries was authorized to organize and did so for the International, which collects and retains dues or per capital tax from every member; and the International supervised these activities through its representative Garrity. Respondent takes the position that a principal cannot authorize a course of action by an agent, take and retain the fruits of its agent's actions and disclaim the agency.

THE MERITS

If it be considered that the above record suffices to raise any question, still there is no validity to the arguments made by petitioner.

The contention would be that the NLRA has pre-empted the field of labor relations to the point where nothing whatever is left to the states. This is not the law.

The position of the court has been made clear in the several decisions touching this point and particularly the Russell case, 356 U.S. 634, 78 S.Ct. 932, as appears from the following:

> "In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute . . . designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights." (78 S.Ct 938, first column)

> "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." (78 S.Ct 938, second column)

> "Under state law presumably he could have recovered for medical expense, pain and suffering and property damages. Such items of recovery are beyond the scope of present Board remedial orders. Following the reason-

> ing adopted by us in the Laburnum case, we believe that state jurisdiction to award damages for these items is not pre-empted. . . . We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." (id. page 939.)

In Russel, the plaintiff was an employee. In Laburnum, 347 US 656, 74 SCt 833, the plaintiff was an employer. Baumgartners was the employer, and had not a single union worker. In that situation, a much stronger case for state court jurisdiction results, as the following from the dissent in Russell points out:

> "The defendant in Laburnum, on the other hand, was a total stranger to the employer's collective bargaining contract, and could claim the membership of not a single worker. There was no prospect of a continuing relationship between the parties to the suit and no need for concern over the climate of labor relations that an action might impair. The defendant was attempting to coerce Laburnum's employees, either by direct threats or employer pressures, to join its ranks. Such predatory forays are disfavored when undertaken by peaceful picketing, ... Finally, the effect of punitive damages in cases such as the present one is entirely different from that which results from the recovery sanctioned in Laburnum. 347 U.S. 656, 74 S.Ct. 833. Since the wrong in Laburnum was committed against an employer, the damages were probably the extent of the defendant's liability for that particular conduct."

As appears from the foregoing, the petitioner has misapprehended the effect of the *Laburnum*, Russell,[1] and Garmon[2] cases.

---

[1] 356 *US* 634, 78 *SCt* 932
[2] 353 *US* 26, 77 *SCt* 607

Under paragraph 2, page 10, petitioner argues that Section 303(b) LMRA provides an exclusive remedy. This ignores the provisions in the statute for suit in the U.S. District Court "or in any other court having jurisdiction of the parties," as well as the recent decisions of this court. Nothing in the language of the statute indicates an intention that this shall be an exclusive remedy. The most that can be said for it is that it indicates an intention that the defendants shall be liable for wrongful acts. In arguing, page 12, that the plaintiff did not seek redress in a common law tort action, petitioner is wrong. The second cause of action of the Supplemental Complaint upon which the judgment is based is most certainly a common law action in tort for "intereference."

Until this Petition for Certiorari, the defendants never suggested that Section 303(b) of the LMRA applied. Surely there is nothing in the statement of Senator Taft (LMRA Legislative History, page 1317) supporting petitioner's position. On the contrary, this and the language of Section 303(b), as well as the Leburnum case, clearly support the right to maintain such damage actions as this.

The petitioner has similarly misapprehended the statement of the South Dakota Supreme Court in regard to this point. (Their footnote, bottom of page 12 of the Petition). The truth is that Plaintiff asserted no rights under Section 303(b) and defendant asserted no defense premised thereon. (Opinion, South Dakota Supreme Court, bottom page 11a, top page 12a of the Petition).

The Taft-Hartley Law does not pre-empt the part of the labor field occupied by the right to work laws as evidenced by Section 14(b) of the act reading:

> "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of

employment in any state or territory in which such execution or application is prohibited by state or territorial law."

This specifically reserved to the states this portion of the field. Since the right to enact such laws was recognized by Taft-Hartley, the right to enjoy the benefits of such laws is not to be taken away by rendering them sterile so that no rights flow from them.

CONCLUSION

In the light of the foregoing it is respectfully submitted that the Petition for Certiorari should be denied.

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Attorney for Respondent.

FILE COPY

No. 551

FILED
JAN 15 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, SODAK PICKET, SINCLAIR PICKET, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners*,

v.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners submit herewith a brief reply to several contentions made in Respondent's Brief In Opposition.

1. Respondent "suggests" rather than asserts "that no reviewable question has been preserved or is presented by this Petition for Certiorari." This suggestion is unsound. As Respondent's brief itself points out, the second Amended Separate Answer of the International Brotherhood of Electrical Workers, particularly paragraphs II and III (pp. 32a - 34sa), unquestionably raised the basic Federal question of whether "Congress by passing said labor management relations act [National Labor Relations Act,

as amended] assumed exclusive jurisdiction and completely preempted the field of labor relations as to industries that affect interstate commerce" (App. 33a).

This question was not only raised with respect to the injunctive relief requested but with respect to the monetary damages sought as well. See paragraph III of the Second Amended Separate Answer (App. 34a) wherein petitioners asserted "that the [State] Court is without jurisdiction to award damages to the plaintiff for all the reasons and causes above cited" in paragraph II.

That a Federal question with respect to both injunctive relief and monetary damages was raised below is indisputably clear from the decision of the Supreme Court of the State of South Dakota, in which the Court specifically held, on the basis of this Court's decision in *Garner* v. *Teamsters Union*, 346 U. S. 486, that the trial court was without jurisdiction to grant injunctive relief and, also, that under this Court's decision in *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656 the trial court did have jurisdiction to impose sanctions by way of damages. Thus, the very Federal questions presented in the petition were considered by the highest court of the State of South Dakota and under such circumstances there is no basis for questioning petitioners' assertion that the Federal questions were properly raised in the State courts. See *Whitney* v. *California*, 274 U. S. 357, 360-1; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134; *Whitfield* v. *Ohio*, 297 U. S. 431, 435, 436; *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185-6. Respondent has inexcusably ignored the decision of the court below in this respect and thus is plainly in error in asserting that there is no basis, other than the Second Amended Answer, for this Court's consideration of the questions presented in the petition. Moreover, in view of the lower court's detailed discussion of such questions, it is difficult to comprehend the basis for respondent's assertion that the petition "fails completely to give counsel or the Court notice of what is now argued" (Resp's Brief, p. 5).

In view of the foregoing, there appears to be little point to the distinction which respondent attempts to draw between the injunctive phase and the damages aspect of this case. Both the trial and appellate courts were fully aware of and accepted consideration of, petitioners' challenge of the State Court's jurisdiction with respect to both aspects of the case, as is clearly evident from the Second Amended Answer, the Motion for a Directed Verdict, the Supreme Court's decision and from the Judgment of the trial court (App. 21a-23a) which similarly disposed of both phases of the case after consideration of the findings of fact and conclusions of law proposed by petitioners.

2. There is nothing in the petition for the Writ which claims, as indicated by Respondent's brief, that Plaintiff asserted any rights under Section 303(b) of the Labor Management Relations Act, 1947. The questions presented in the petition relate solely to the issue of the jurisdiction of courts of the State of South Dakota over an action for damages such as that instituted by respondent. And, in this connection, the applicability of Section 303(b) is deemed to constitute a valid argument in support of the conclusion that state jurisdiction to award damages under state law is preempted.

Respectfully submitted,

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VS.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent.*

PETITION FOR REHEARING

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vs.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent.*

PETITION FOR REHEARING

We hereby certify that this Petition is presented in good faith and not for delay. As will be hereinafter specified it presents a substantial matter not previously presented.

We feel that in reversing this case on the authority of *San Diego Building Trades Council, etc., v. Garmon,* 79 S. Ct. 773, the Supreme Court of the United States has overlooked and misapprehended the nature of the issue in the case at bar in that the jury and the trial court in this case both found that the wrong done the plaintiff was malicious. This was confirmed by the opinion of the South Dakota Supreme Court The complaint alleged that defendants' picketing was for the purpose of injuring and destroying the plaintiff and that the plaintiff was maliciously pursued from job to job to

this end. These allegations were fully sustained by the evidence and accepted by the Court and Jury.

Surely such a wrong, even though not involving violence, is just as offensive, just as reprehensible and just as damaging as if it did involve violence, so that the rule of *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 Sup. Ct. 833, 835, 98 Law Add. 1025 should have been applied instead of the rule of the Garmon case.

Respondent therefore respectfully requests that this matter be reconsidered and that a hearing be granted in this Court on the merits.

Respectfully submitted,

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